



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
)  
) ISCR Case No. 11-01538  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minster, Esquire, Department Counsel  
For Applicant: *pro se*

11/06/2012

**Decision**

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the sexual behavior and personal conduct security concerns generated by his viewing adult and child pornography on his U.S. Army-issued laptop computer and failing to be forthcoming about the conduct during this investigative process. Clearance is denied.

**Statement of the Case**

On April 16, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing allegations under Guideline D, Sexual Behavior, and Guideline E, Personal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on May 2, 2012, admitting subparagraphs 1.a, 1.b, and 2.a., and denying subparagraphs 1.c, 2.b, and 2.c. He did not address subparagraph 2.d in his answer.

The case was assigned to me on August 30, 2012. A notice of hearing was issued on September 19, 2012, scheduling the hearing for October 22, 2012. The hearing was held as scheduled, and I received six Government exhibits and the testimony of Applicant. The transcript (Tr.) was received on November 1, 2012.

### **Findings of Fact**

Applicant is a 45-year-old married man with an adult stepdaughter. He has a high school diploma and, over the years, has earned two years of college credits. Since July 2009, Applicant has worked as a systems administrator for a defense contractor. (Tr. 39)

Applicant served in the U.S. Army from 1987 to 2003. During this period, he earned several awards and accolades including a National Defense Service Medal, Kuwait Liberation Service Medal, and three Bronze Service Stars. (GE 4 at 2)

From approximately 1998 to 2003, Applicant, while assigned overseas as an administrative clerk, downloaded and viewed pornography on his Government-issued laptop computer. (GE 6 at 3; Tr. 22) The pornographic images included pictures of children. Also, during this period, Applicant occasionally photographed pictures of himself nude in his Government office, and posted them on Internet chat rooms using his Government-issued computer.

In 2003, as Applicant was preparing for a re-assignment, he “attempted to clean [his] Government computer hard drive and get rid of child and adult pornography [that he] had downloaded. He then attempted to mail the computer home to use for his personal use. He had no intention of returning it to the base from which he was transferring. (GE 6 at 3)

In March 2004, Applicant executed a signed, sworn statement, as part of a U.S. Army criminal investigation into his conduct. At that time, he admitted viewing child pornography out of curiosity, and he admitted obtaining the images of child pornography from Internet chat rooms. (GE 6 at 3-4) A forensic analysis conducted as part of the Army’s investigation revealed there were eight child pornographic images located on two floppy disks.

On March 12, 2004, Applicant was charged with larceny, receiving child pornography, and possessing child pornography. Subsequently, Applicant was discharged under other than honorable conditions in lieu of trial by court martial. (Answer; GE 2 at 3)

Applicant completed a security clearance application in June 2010. In response to Section 13C,<sup>1</sup> Applicant answered, “Yes,” and listed the charges of larceny and improper use of government equipment. He did not list the charge relating to child pornography. Applicant testified that he did not list the charge because it was dismissed. (Tr. 34) Applicant also testified that he probably took pictures of himself naked between 1998 and 2003, but could not recall taking any of these pictures while at work. (Tr. 26)

In June 2010, a DoD investigator interviewed Applicant and asked him whether he viewed child pornography between 1998 and 2003. Applicant responded that he did not intentionally view any child pornography. (GE 2 at 3)

Applicant was arrested and charged, once in 1989 and once in 1992, with driving under the influence of alcohol. He did not list these arrests, as required, in response to Section 22 of his security clearance application. Applicant testified that he did not list these arrests because he mistakenly thought he was only supposed to list arrests that occurred within the past seven years of completing the security clearance application. (Tr. 37)

Applicant is active in his church, participating as a deacon, an usher, and a member of the choir. He has not undergone any pastoral counseling, or any other type of counseling, related to the episode that led to his discharge from the Army. (Tr. 39) None of his church friends and acquaintances know about the circumstances surrounding his discharge from the Army. (Tr. 39) Applicant testified that he has not viewed any pornography since 2003. (Tr. 40)

### **Policies**

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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<sup>1</sup>Has any of the following happened to you in the past 7 years?

1. Fired from job.
2. Quit a job after being told you would be fired.
3. Left a job by mutual agreement following charges or allegations of misconduct.
4. Left a job by mutual agreement following notice of unsatisfactory performance.
5. Left a job for other reasons under unfavorable circumstances.
6. Laid off from a job by employer.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” Applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

## **Analysis**

### **Guideline D, Sexual Behavior**

Under this guideline, “sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.” (AG ¶ 12) Applicant’s conduct triggers the application of the following disqualifying guidelines under AG ¶ 13:

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects a lack of discretion or judgment.

Applicant did not testify truthfully about whether or not he intentionally viewed child pornography. Moreover, he falsified his security clearance application by failing to include the child pornography charge when setting forth the reason for his general discharge under other than honorable conditions from the military. (See Personal Conduct section, *infra*.) He repeated this falsification during an interview with a DoD investigator. I conclude that Applicant is not a credible witness.

Applicant’s lack of credibility undermines his testimony that he has not viewed child or adult pornography since 2003. Applicant has not received any counseling related to his misconduct. Also, his friends at church do not know about it. Consequently, even if he was telling the truth about the passage of time since he last viewed child pornography, his rehabilitation remains in question, and he remains vulnerable to coercion. None of the mitigating conditions apply.

### **Personal Conduct**

Under this guideline, “conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

about an individual's reliability, trustworthiness, and ability to protect classified information." (AG ¶ 15)

Applicant's omission of the child pornography and the alcohol-related charges from his security clearance application, and his statement to the DoD investigator that he did not intentionally view any child pornography, raises the issue of whether the following disqualifying conditions under AG ¶ 16 apply:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant's 2010 statement to a DoD investigator, in response to questions about his misuse of a government computer between 1998 and 2003, that he did not intentionally view any child pornography contradicted what he told a U.S. Army investigator in 2004. I conclude that AG ¶ 16(b) applies without mitigation.

Under these circumstances, Applicant's explanation for not listing either the pornography charge or the alcohol-related charges, as required, on his security clearance application is not credible. AG ¶ 16(a) also applies without mitigation.

Applicant's sexual misconduct, as analyzed under the previous section, also triggers a personal conduct concern under AG ¶ 16(e), "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing . . ." Applicant failed to mitigate the concerns under this guideline for the same reasons, as set forth in the evaluation of the sexual behavior security concern.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have considered the applicability of the whole-person factors in my analysis of the guidelines above, and I conclude that they do not warrant a favorable conclusion.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a-1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a-2.d:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY  
Administrative Judge